2013 IL App (1st) 111807-U

THIRD DIVISION
August 14, 2013

No. 1-11-1807

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 16270
	)	
RICKY ANDERSON,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HYMAN delivered the judgment of the court.
Presiding Justice Neville and Justice Mason concurred in the judgment.

O R D E R

¶ 1 Held: When the trial court's oral pronouncement conflicts with the common law record, the court's oral pronouncement controls and the common law record must be corrected. Accordingly, defendant's mittimus must be corrected to reflect convictions for aggravated criminal sexual abuse. Five of defendant's eight convictions must be vacated under the one-act, one-crime rule when all eight are based on the same three physical acts.

¶ 2 At issue is the crime of which defendant Ricky Anderson was convicted.[1] Anderson contends that he was convicted of criminal sexual abuse, and the State contends that he was convicted of aggravated criminal sexual abuse. Anderson further argues that it follows, the trial

[1] Defendant's name is also spelled Rickey in the record.

court sentenced him to twice the maximum extended-term prison sentence. He also contends that five of his eight convictions should be vacated as violations of the one-act, one-crime rule when these eight convictions are based on three physical acts. We affirm in part, vacate in part, and order that Anderson's mittimus be corrected.

¶ 3 Background

¶ 4 Anderson was charged, by indictment, with predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, and unlawful restraint following a July 2009 incident involving the victim, his girlfriend's 10-year-old daughter M.B. The matter proceeded to a bench trial.

¶ 5 At trial, the victim testified that Anderson, the father of her four siblings, treated her like his own child. On July 11, 2009, when the victim and Anderson were alone, Anderson removed the victim's clothes. Anderson then licked the victim "down there," *i.e.*, the part she used to go to the bathroom, and tried to stick his "thing" inside her. The victim explained that his "thing" was what Anderson used to go to the bathroom. Anderson's penis only went in a little bit before the victim told Anderson to stop because it hurt. She began to cry, and Anderson responded by removing his penis, licking the victim again, turning her over, and putting his penis in her "butt." This also hurt. Anderson then "peed" on her back and wiped off the liquid. Ultimately, the victim got dressed and locked herself in a room with her siblings. She later told her younger sister and mother what happened and was taken to hospital. The victim admitted that initially she told a social worker and the police only about the vaginal contact because she was embarrassed about the other contacts. But, in time, she revealed everything that had happened.

¶ 6 The victim's mother and social worker Gail Aranda both testified that the victim said that Anderson raped her and only mentioned the vaginal contact.

¶ 7 In finding Anderson guilty, the court found that there was "molesting that didn't involve penetration," rather it involved sexual contact between Anderson's penis and the victim's vagina and anus, and between Anderson's mouth and the victim's vagina. Therefore, the court found Anderson "guilty of the lesser offense of aggravated criminal sexual abuse, [a] Class 2 felony." The court's written order of March 23, 2011 reflects that Anderson was found guilty of the "LESSER INCLUDED [offense of] AGG. CRIM. SEX. ABUSE CLASS 2." The half-sheet also indicates that Anderson was found guilty of aggravated criminal sexual abuse.

¶ 8 At sentencing, the court first stated that criminal sexual assault was a Class 1 offense and that Anderson was found guilty of eight counts of the "lesser included offenses of aggravated criminal sexual abuse." The court then questioned whether the findings were all "criminal sexual abuse," and the State replied in the affirmative. But, in its subsequent argument, the State reiterated that Anderson had been found guilty of the Class 2 felony of aggravated criminal sexual abuse and that his criminal background made him subject to an extended-term sentence. The trial court sentenced Anderson to eight concurrent extended-term sentences of 12 years in prison. Anderson's mittimus reflects that he was convicted of eight counts of criminal sexual abuse.

¶ 9 Analysis

¶ 10 On appeal, Anderson relies on the mittimus and the court's statement at sentencing that he was convicted of criminal sexual abuse. The State responds that the trial court convicted Anderson of aggravated criminal sexual abuse.

¶ 11 Initially, we note that Anderson does not argue that the facts were insufficient for the trial court to have convicted him of aggravated criminal sexual abuse, "should the court have opted to do so." He simply contends that the trial court "did not so opt."

¶ 12 "Although the common law record imports verity and is presumed correct, where the common law record is contradicted by matters in the report of proceedings, a reviewing court must look at the record as a whole to resolve the inconsistencies." *People v. Durr,* 215 Ill. 2d 283, 306 (2005). The words of the judge in open court when imposing sentence constitutes the judgment of the court; the written order of commitment merely records the judgment. *People v. Jones*, 376 Ill. App. 3d 372, 395 (2007). When there exists a disparity between the common law record and the report of proceedings, the report of proceedings controls. *People v. Peeple*s, 155 Ill. 2d 422, 496 (1993).

¶ 13 The record reveals that Anderson was charged with, *inter alia*, predatory criminal sexual assault in that Anderson, who older than 17 years, committed an act of sexual penetration on the victim, who was under 13 years of age. In finding Anderson guilty, the trial court found there was "molesting," but not penetration. That is, there was sexual contact between Anderson's penis and the victim's vagina and anus, and between defendant's mouth and the victim's vagina. Hence, the trial court found Anderson "guilty of the lesser offense of aggravated criminal sexual abuse," a Class 2 felony. See 720 ILCS 5/12-16(c)(1)(i) (West 2008) (defendant commits aggravated criminal sexual abuse if defendant, aged 17 or older, commits act of sexual conduct with victim under 13 years of age at time the act was committed); see also *People v. Kolton*, 219 Ill. 2d 353, 370-71 (2006) (concluding that in cases where defendant is charged with predatory sexual assault of a child based on certain acts of sexual penetration, defendant has reasonable notice that such a charge might encompass lesser-included offenses of aggravated criminal sexual abuse and criminal sexual abuse). The court's written order of March 23, 2011, as well as the half-sheet, reflect that Anderson was found guilty of aggravated criminal sexual abuse.

¶ 14 Although Anderson is correct that at sentencing the trial court initially questioned whether the finding was criminal sexual abuse and that the mittimus reflects eight convictions for

criminal sexual abuse, the oral pronouncement of the trial court is the judgment of the court and the mittimus serves as the evidence of that judgment. See *Jones*, 376 Ill. App. 3d at 395. Therefore, Anderson's mittimus must be corrected to reflect that he was convicted of aggravated criminal sexual abuse. *Peeple*s, 155 Ill. 2d at 496 (when common law record conflicts with report of proceedings, the report of proceedings prevails and the common law record must be corrected). Under Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we order the clerk of the circuit court to correct Anderson's mittimus to reflect that he was convicted of aggravated criminal sexual abuse.

¶ 15 Anderson was sentenced to eight concurrent extended-term sentences of 12 years in prison. Aggravated criminal sexual abuse is a Class 2 felony with an applicable extended-term sentencing range of between seven and 14 years in prison (720 ILCS 5/12-16(g) (West 2008), 730 ILCS 5/5-8-2(a)(4) (West 2008)). Having found that Anderson's sentences fall within the appropriate statutory range, we reject Anderson's claim that he was sentenced to twice the maximum extended-term sentence.

¶ 16 Anderson next contends that five of his eight convictions must be vacated under the one-act, one-crime rule when they are all based on the same three physical acts. He argues that when there was only one penis-to-vagina contact and one penis-to-anus contact, he was improperly convicted of three counts based on penis-to-vagina contact and four counts based on penis-to-anus contact. Anderson acknowledges that his failure to raise this issue before the trial court has resulted in its forfeiture on appeal, but requests that this court review the issue for plain error. See *In re Samantha V.*, 234 Ill. 2d 359, 378-79 (2009) ("it is well established that a one-act, one-crime violation affects the integrity of the judicial process, thus satisfying the second prong of the plain-error test").

¶ 17 The State concedes, and we agree, that Anderson should have been convicted of one count of aggravated criminal sexual abuse based on contact between his penis and the victim's vagina and one count of aggravated criminal sexual abuse based on contact between his penis and the victim's anus when the trial court found that there was one instance of penis-to-vagina contact and one instance of penis-to-anus contact. Our supreme court has held that "[p]rejudice results to the defendant * * * in those instances where more than one offense is carved from the same physical act." *People v. King,* 66 Ill. 2d 551, 566 (1977). Because adjudications for more than one offense cannot be carved from the same criminal act (*King*, 66 Ill. 2d at 566), two of defendant's conviction for penis-to-vagina contact and three of defendant's convictions for penis-to-anus contact must be vacated.

¶ 18 The State relies on *People v. Eubanks,* 279 Ill. App. 3d 949, 963 (1996), citing *People v. Holman,* 103 Ill. 2d 133, 159 (1984), to argue that it has the right to elect which convictions should stand, and requests that defendant's convictions for aggravated criminal sexual abuse based on the victim's inability to consent stand. Therefore, we vacate Anderson's convictions for aggravated criminal sexual abuse as to counts 34, 37, 40, 41 and 43. Counts 35, 38, and 44 stand.

¶ 19 Anderson's motion to reconsider the denial of his motion to expedite the appeal and for other relief, which was taken with the case, is denied.

¶ 20 Pursuant to Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we order the clerk of the circuit court correct Anderson's mittimus to reflect that he was convicted of aggravated criminal sexual abuse. We also vacate Anderson's convictions as to counts 34, 37, 40, 41, and 43. We affirm the judgment of the circuit court of Cook County in all other aspects.

¶ 21 Affirmed in part; vacated in part; mittimus corrected; motion to reconsider denied.